

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 22, 2008 Session

STATE OF TENNESSEE v. TIMOTHY W. LEE

**Appeal from the Criminal Court for Wilson County
No. 04-0873 J. O. Bond, Judge**

No. M2007-02680-CCA-R3-CD - Filed March 11, 2009

The defendant, Timothy W. Lee, appeals as of right his jury conviction for rape of a child, a Class A felony, for which he received a sentence of twenty-five years to be served at one hundred percent. The defendant contends that the evidence is insufficient to support his conviction, that the trial court erred in admitting hearsay evidence as an excited utterance, that the trial court erred in requiring the defendant to testify prior to the admission of character evidence, that the State improperly interjected personal opinion into its closing argument, and that the trial court enhanced the length of the sentence in violation of State v. Gomez, 239 S.W.3d 733 (Tenn. 2007). Following our review, we affirm the defendant's conviction for rape of a child but conclude that the trial court's imposition of a sentence beyond the presumptive minimum violated Gomez. Therefore, the case is remanded for entry of the modified sentence consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed in Part and Reversed in Part; Remanded.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES, and THOMAS T. WOODALL, JJ., joined.

Comer L. Donnell, District Public Defender; Tillman W. Payne, III, and Shelly J. Thompson, Assistant District Public Defenders, attorneys for appellant, Timothy W. Lee.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Tom P. Thompson, Jr, District Attorney General; and Jason Lawson, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The defendant's conviction for rape of a child concerns events occurring on July 11, 2004, when the defendant spent the day at the home of his niece, M.N., the six-year-old victim. The

defendant visited the home that day while his two step-daughters, V.M. and A.M.,¹ babysat the victim along with two of her younger siblings. Mt. Juliet Police Department Officer Steve Holliday testified that he was called to the residence on the evening of July 11 in order to interview the victim's parents for the purpose of taking the initial report. He also stated that he contacted Detective Greg Graves and Child Protective Services (CPS) regarding further investigation of the incident.

The victim's mother, Wendy Nelms, testified that she and her sister, the defendant's wife, had left her home for a "Daughter's Day" trip to Kentucky with their parents at approximately 8:30 a.m. on July 11. She left her three oldest children – ages two, three and six – in the care of her nieces. Her youngest child was only four months old so she took him with her to Kentucky. Nelms' eldest niece, V.M., was a regular babysitter and had been spending much of the summer with the family to assist with the care of the children. The defendant accompanied A.M. and his wife to the home that day. Although she knew the defendant was staying to visit with his step-daughters, she testified that it was not her decision that he be there all day.

When Nelms and her sister returned at approximately 5:30 p.m., her sister went upstairs to get the defendant. Nelms recalled that the defendant and her sister came downstairs and left within fifteen minutes. She also recalled that the victim came downstairs at the same time and that she appeared "agitated, very upset" as well as "anxious, nervous, [and] distraught." Minutes later, as Nelms began preparing dinner, M.N. told her that she wanted to take a bath and reported that the defendant "had stuck his fingers in her butt." A few minutes later while giving the children a bath, Nelms asked M.N. more about the incident at which time M.N. indicated that she had reported it to her cousin, V.M.. Nelms also stated that she asked M.N.'s permission to "look at her bottom," which M.N. allowed. Nelms testified that the victim's bottom was "very red and irritated." When her husband returned home from work that evening, they called the police. Officer Holliday then arrived to take the initial report.

V.M. testified that she was fifteen years old at the time of the incident. She recalled that her younger sister, A.M., and the defendant were coming over to her aunt's house while her aunt and mother went on a family outing with her grandparents. The defendant went upstairs to take a nap but the three Nelms children followed him. She remembered hearing the two girls say "ouch" and went upstairs to check on everyone to find them playing a "flipping" game with the defendant.

Sometime later that morning, M.N. came downstairs to use the bathroom with what V.M. described as "a foul look on her face." V.M. testified that A.M. said something to the victim about the look and the victim said "you don't know what your daddy just did to me." V.M. testified the victim's statement led her to go upstairs to ask the defendant what he had done "to piss [the victim] off so bad." The defendant told her "I don't know what you're talking about. I didn't do anything." V.M. also recalled that the defendant was wearing boxer shorts and the victim's pants, but not

¹ It is this court's policy to refer to victims of sexual abuse by their initials only. Because the victim's two cousins are also minors, we choose to protect their anonymity as well.

panties, were pulled down when she went upstairs. She testified that it was not unusual for the defendant to be wearing only boxer shorts if they were at home. Nevertheless, she told the victim to pull up her pants and come downstairs with her. V.M. also testified that it was not unusual for the victim to be found alone or at nap time with her pants down but that the family doctor had indicated it was a phase that the victim would outgrow. At lunchtime, V.M. began making lunch for everyone but the defendant indicated he was going to Arby's. The victim wanted to go with him so V.M. decided to go along "because [she] felt disoriented about the whole situation."

Detective Greg Graves of the Mt. Juliet Police Department testified that he investigated the initial report taken by Officer Holliday. He spoke only to the victim's parents because it was standard procedure that only CPS speak with a child victim. After receiving the CPS interview, Detective Graves contacted the defendant who agreed to talk at the police station. In an initial statement, the defendant told Detective Graves that the victim began jumping on the bed while he was asleep. The defendant awoke to find that the victim had her finger in her rectum. The defendant "slapped her on the butt" and went back to sleep. During the interview with Detective Graves, the defendant agreed to a polygraph examination but changed his mind during the initial questions. The defendant then waived his Miranda rights and gave a second statement wherein he admitted that his fingers slipped into the victim's vagina when he spanked her. He also reported that later in the afternoon while sitting on the floor, the victim noticed the defendant's penis was showing from his boxer shorts, alerted the defendant, and grabbed his penis. The defendant said that he jumped up and urinated on himself when this happened. Detective Graves testified that bedding collected from the victim's room was tested but revealed no presence of bodily fluids. He also recalled that there was no medical report of injury to the victim.

The victim, M.N., who was eight years old at the time of trial, testified but with some difficulty. She stated that her mother had taught her about improper touching and that the defendant had touched both the front and back of her "private parts." She said that it hurt when he touched "the inside" of her privates. She also testified that she saw the defendant's "front private" and that "[h]e squirted water out of it." She admitted that she had never liked the defendant, even prior to the incident, and that she went upstairs that morning so that her younger sister would not be alone with him.

The defendant presented the testimony of his step-daughter, A.M., who testified contrary to much of the State's proof. She stated that only the defendant and the victim went upstairs that day. She had no recollection of the victim coming downstairs to use the bathroom. She recalled that the victim never made any statements of complaint to her or her sister, V.M.. She testified that V.M. made lunch in the kitchen, without mention of any trip to Arby's. A.M. also reported that the victim regularly put things, "like legos," in her pants. On cross-examination, she stated that, since the defendant's arrest, she had to live with her grandparents and wanted to be back with her mother and the defendant at home. J.A., a friend of the victim's cousins, testified that she babysat for the Nelms family in the past and that the victim would often pull down her pants. J.A. also testified that she had spent the night at the defendant's home before and that she had never had any problems with the defendant.

The defendant testified that he talked to the police without getting any legal advice because he “didn’t think it was any big deal for swatting a kid.” The defendant recounted the contact he had with the victim consistent with his statements to the police. He never denied that he spanked the victim, but he stressed that he did not touch her in a sexual way and that “any contact would have been accidental or incidental, but it’s kind of hard not to touch something that is hanging out.” He acknowledged that his second statement to the police was more detailed because he actually admitted that his fingers penetrated her vagina and that the victim had touched his penis. He testified that he did not think it was necessary to discuss the incident involving his penis because it was the victim’s fault that had occurred – specifically testifying that “[he] didn’t do anything.”

The defendant also presented the testimony of three witnesses who stated that they knew the defendant to be of generally good character for the four to twenty years each witness had known him. Each testified on cross-examination that it would surprise and disappoint them to learn that the defendant had committed the acts reported in this case.

ANALYSIS

Sufficiency of the Evidence

The defendant contends that the evidence is insufficient to support the conviction for rape of a child because there is no proof that *sexual* penetration occurred. The defendant insists that the touching was nothing more than accidental and incidental to the spanking. The State argues that the jury chose to accredit the testimony of the victim and that such evidence is sufficient to support a conviction for rape of a child. We agree with the State.

An appellate court’s standard of review when the defendant questions the sufficiency of the evidence on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury’s verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

The offense consists of showing beyond a reasonable doubt that (1) the defendant unlawfully sexually penetrated the victim, (2) who was less than thirteen years old, and that (3) the defendant

acted intentionally, knowingly, or recklessly. Tenn. Code Ann. § 39-13-522 (2003). Sexual penetration is defined, in relevant part, as an “intrusion, however slight, of any part of a person’s body . . . into the genital or anal openings of the victim’s . . . body.” Tenn. Code Ann. § 39-13-501(7). The proof in this case showed that the defendant’s fingers penetrated the labia of the six-year-old victim. The defendant’s argument on appeal essentially asks this court to reweigh the credibility of the victim versus his explanation that the touching occurred incidental to a spanking. Not only are we precluded from this, but such an act would still sufficiently show that the defendant, at a minimum, acted recklessly. The defendant has not met his burden on appeal of showing how the evidence is insufficient to support the verdict. Therefore, we conclude that there was sufficient evidence to convict the defendant of rape of a child.

Excited Utterance Testimony

Next, the defendant complains that the trial court erroneously admitted evidence of the victim’s statement to her mother in violation of hearsay rules and his right to confrontation. The State contends that the trial court properly admitted the statement as an excited utterance exception to the hearsay rule. Additionally, the State argues that the defendant’s confrontation clause issue must fail due to the defendant’s failure to object on that basis at trial and because the declarant-victim testified at trial.

Trial courts are afforded broad discretion in the admission of evidence and this court will not disturb the decision to admit evidence absent a showing of an abuse of that discretion. State v. Robinson, 146 S.W.3d 469, 490 (Tenn. 2004); State v. James, 81 S.W.3d 751, 760 (Tenn. 2002). Rule 801(c) of the Tennessee Rules of Evidence defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Generally, hearsay evidence is inadmissible. Tenn. R. Evid. 802. For hearsay to be admissible, it must fall within the hearsay exceptions provided by Rule 803 of the Tennessee Rules of Evidence.

One exception to the exclusion of hearsay statements is the excited utterance exception found at Rule 803(2) of the Tennessee Rules of Evidence which applies to statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” This court has explained that “[t]he underlying theory of this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.” State v. Land, 34 S.W.3d 516, 528 (Tenn. Crim. App. 2000). For a statement to qualify as an excited utterance, three criteria must be met: (1) there must be a startling event or condition that causes the stress of excitement; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant was under the stress of excitement. Id. at 528-29 (citing Neil P. Cohen, et. al., Tennessee Law of Evidence § 803(2).2 at 533-34 (3d ed.1995)).

The victim’s mother testified that as soon as she returned home, she noticed that the victim appeared very nervous, agitated and distraught. Within minutes, the victim begged her to take a bath

because the defendant had “stuck his fingers in her butt.” The defendant objected to the admission of the statement because, he argued, “this [was] not an event that [had] just taken place and [the victim] ran out and made a statement.” The State argued that the victim told her mother as soon as she could – when the mother arrived home – and that she was still under the stress of the event in light of the mother’s description of her demeanor. The trial court ruled the statement admissible as an excited utterance, finding that “it’s logical that the child would wait or at least declare it to her mother” and that the statement was made “within a matter of a short time after the mother came home.” We agree with the trial court’s reasoning and conclude that the statement was properly admitted as an excited utterance. We further note, as did the State, that the defendant failed to object to the admission of the statement on confrontation clause grounds and that the victim ultimately testified. Therefore, we conclude that the defendant’s right to confrontation was not violated by the admission of the statement. Accordingly, the defendant is denied relief on this issue.

Character Evidence

Next, the defendant contends that the trial court erred in ruling that he must testify prior to the presentation of witnesses who would testify as to his good character. The record reflects that the defendant sought to introduce through several witnesses that the defendant had been “a law-abiding citizen all his life” in an effort to show that he did not commit the offense. The State objected to the admission of the evidence, reasoning that “there isn’t any pertinent character trait in this case” and that therefore, the defendant was required to testify prior to presenting any character evidence. The trial court ruled that the evidence was too general and would not be relevant unless raised by the defendant’s own testimony. Following our review, we conclude that the trial court’s ruling was in error. However, we further conclude that any error was harmless beyond a reasonable doubt.

Rule 404(a)(1) of the Tennessee Rules of Evidence allows the admission of “[e]vidence of a pertinent character trait offered by the accused.” In State v. Phipps, 883 S.W.2d 138, 153 (Tenn. Crim. App. 1994) (citations omitted), this court explained “[t]hat evidence may be introduced through the testimony of character witnesses who testify about a pertinent character trait or through the testimony of the defendant testifying personally.” This court further observed that “[i]t is not necessary for the defendant to take the stand before being allowed to present evidence of a pertinent character trait Thus, the inquiry for the court is not whether the defendant has testified but is whether the evidence offered concerns a ‘pertinent character trait.’” Id. Furthermore, as explained in Phipps “[i]n the context of any criminal case the accused is entitled to offer evidence of ‘good character . . . as tending to show that [the accused] would not commit the crime’ *even if the accused does not testify.*” Id. (emphasis added) (citations omitted).

In this case, the defendant contends that he should have been permitted to present testimony regarding his reputation as a law-abiding citizen and his reputation in situations involving contact with children in an effort to show character traits that would support his defense that the touching that occurred in this case was accidental. Through several witnesses, the defendant elicited testimony regarding his reputation as a truthful “man of good character” and someone one would trust with their children. One witness testified that to learn that the defendant had committed the acts

described in this case would be a disappointing surprise and “totally out of character.” We conclude, contrary to the State’s argument, that this evidence was relevant to show that the defendant would not have committed the crime. As such, it was evidence of a pertinent character trait admissible under Rule 404(a)(1) and the trial court erred in requiring the defendant to testify prior to its admission.

Our finding that the trial court erred in requiring the defendant to testify prior to the admission of character evidence does not end our analysis. The United States Supreme Court has “repeatedly recognized” that “‘most constitutional errors can be harmless.’” Washington v. Recuenco, 548 U.S. 212, 218, 126 S. Ct. 2546, 2551 (2006) (citing Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827 (1999) and quoting Arizona v. Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246 (1991)). The Tennessee Rules of Appellate Procedure provide for harmless error review. See Tenn. R. App. P. 36(b). However, “[a]ll errors are not the same, nor do they have the same effect on the judicial process in general or on a particular trial.” State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008). Accordingly, our supreme court “has recognized three categories of error – structural constitutional error, non-structural constitutional error, and non-constitutional error.” Id.

“Structural constitutional errors are errors that compromise the integrity of the judicial process itself.” Id. (citing State v. Garrison, 40 S.W.3d 426, 433 n.9 (Tenn. 2000)). A structural error “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Neder, 527 U.S. at 9. Accordingly, “[s]tructural constitutional errors are not amenable to harmless error review, and therefore, they require automatic reversal when they occur.” Id. Examples of structural constitutional errors identified by the Supreme Court include complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of public trial, and a defective reasonable doubt jury instruction. Recuenco, 548 U.S. at 218 n.2.

“[N]on-structural constitutional errors do not require automatic reversal and are, therefore, subject to a harmless error analysis.” Rodriguez, 254 S.W.3d at 371 (citing State v. Allen, 69 S.W.3d 181, 190 (Tenn. 2002)). As opposed to structural errors, which render the defendant’s involvement in the judicial process fundamentally unfair, the Supreme Court has noted that non-structural constitutional errors “involve[] ‘trial error’—error which occurred during the presentation of the case to the jury and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” Fulminante, 499 U.S. at 307-08. While such “trial errors” may be harmless, “[t]he existence of a non-structural constitutional error requires reversal unless the State demonstrates beyond a reasonable doubt that the error is harmless.” Rodriguez, 254 S.W.3d at 371. In other words, non-structural constitutional errors may only be considered harmless when the state can prove “‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” Allen, 69 S.W.3d at 190 (quoting Neder, 527 U.S. at 15).

We note that “the right of a criminal defendant to testify in his or her own behalf is a fundamental constitutional right.” Momon v. State, 18 S.W.3d 152, 161 (Tenn. 1999). Conversely,

it is the right of the defendant *not* to testify. A constitutional error occurs when a defendant, in an effort to present his defense, is forced to testify due to a trial court's erroneous application of evidentiary rules. Therefore, we conclude that this is a non-structural constitutional error subject to harmless error review.

As previously stated, to sustain the defendant's conviction, the State must prove beyond a reasonable doubt that the trial court's error did not contribute to the defendant's conviction. The defendant testified consistent to his previous statements which had already been admitted at trial. Through his direct testimony, he was also given the opportunity to explain certain inconsistencies between his first and second statements to investigators. The State's cross-examination of the defendant did little to impeach or discredit his direct testimony. For these reasons, we conclude that the error in this case was harmless beyond a reasonable doubt. Accordingly, the defendant is denied relief on this issue.

Improper Closing Argument

The defendant contends that the prosecutor committed misconduct when he improperly interjected personal opinion about the credibility of the defendant into his closing argument by stating, in reference to the defendant's explanation of events, "if you believe that statement, then I guess I'll know what your verdict will be." The trial court overruled the defendant's objection, finding that it was proper argument to tell the State's theory of the case. Accordingly, the trial court denied a curative instruction. On appeal, the State contends that the comment was not improper but was merely a statement "that if the jury accredited the defendant's story, the outcome of the trial was evident – by implication, an acquittal."

Our supreme court has recognized that closing argument is a valuable privilege for both the state and the defense and that counsel is afforded wide latitude in presenting final argument to the jury. See State v. Cribbs, 967 S.W.2d 773, 783 (Tenn.1998); State v. Cone, 665 S.W.2d 87, 94 (Tenn. 1984). However, a party's closing argument "must be temperate, predicated on evidence introduced during trial, relevant to the issues being tried, and not otherwise improper under the facts or law." State v. Middlebrooks, 995 S.W.2d 550, 568 (Tenn. 1999). This court, citing to standards promulgated by the American Bar Association,² has identified "five general areas of prosecutorial misconduct": (1) intentionally misstating the evidence or misleading the jury as to inferences it may draw; (2) expressing the prosecutor's personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant; (3) using arguments calculated to inflame the passions or prejudices of the jury; (4) using arguments that would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused or by predicting the consequences of the jury's verdict; and (5) intentionally referring to or arguing facts outside the record unless the facts are matters of public knowledge. State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003) (citations omitted).

²See American Bar Association, ABA Standards for Criminal Justice: Prosecution Function and Defense Function §§ 3-5.8, 3-5.9 (3d ed. 1993).

A lawyer should not assert a personal opinion concerning the credibility of a witness. State v. Henley, 774 S.W.2d 908, 911 (Tenn.1989). However, not all errors in closing argument necessitate a new trial. When a prosecutor's argument goes beyond the latitude afforded, the appellant is required to show that the argument or the conduct was so egregious that it affected the verdict to his detriment. State v. Farmer, 927 S.W.2d 582, 591 (Tenn. Crim. App.1996). The factors to be considered in reviewing alleged prosecutorial misconduct are: the intent of the prosecutor, the curative measures undertaken by the court, the improper conduct viewed in context and in light of the facts of the case, the cumulative effect of the remarks with any errors in the record, and the relative strength or weakness of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App.1976). The defendant contends that the State's argument improperly commented on his credibility. However, when considered in the context of the entire argument and the evidence in this case, we cannot agree. Furthermore, even assuming for argument sake that this was a comment on the defendant's credibility, we cannot conclude that this isolated comment was "so egregious that it affected the verdict to [the defendant's] detriment." Therefore, we deny the defendant relief on this issue.

Sentencing

In his final allegation, the defendant argues that the trial court erred in imposing the maximum sentence of twenty-five years for his conviction for rape of a child. The record reflects that the trial court increased the defendant's sentence to the statutory maximum based upon its findings that the personal injuries inflicted upon the victim were particularly great and that the defendant abused a position of private trust. Tenn. Code Ann. § 40-35-114(7) and (16) (2003). The defendant argues that the trial court applied these enhancement factors in violation of State v. Gomez, 239 S.W.3d 733 (Tenn. 2007). The State concedes that the trial court erred in its application of enhancement factors. Both parties also admit that the defendant lacks any history of criminal convictions to justify enhancement of his sentence. Accordingly, we reverse the trial court's imposition of a twenty-five year sentence and modify the sentence to twenty years to be served at one hundred percent.

CONCLUSION

In consideration of the record and arguments of counsel, the judgment of the trial court is affirmed in part and reversed in part. The case is remanded for imposition of judgment reflecting a sentence of twenty years to be served at one hundred percent.

D. KELLY THOMAS, JR., JUDGE